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IN THE

Supreme Court of the United States

October Term, 1969

No. 1126

UNIVERSAL MARINE CORPORATION and
S.S. HONG KONG PRODUCER, her engines, etc.,

Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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UNIVERSAL MARINE CORPORATION and S.S. HONG KONG PRODUCER, her engines, etc.,

Petitioners,

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ENCYLOPAEDIA BRITANNICA, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioners by their willful breach of a maritime contract providing for the transportation of respondent's cargo under-deck rather than on-deck, caused respondent to sustain a loss of $172,200, as a consequence of the resulting unreasonable deviation. Petitioners now ask this Court for limitation of liability to the nominal sum of $1,000, in lieu of their liability at common law as insurers, as was held by the court below.

Counter-statements of Questions Presented

1. Did petitioners act in stowing on-deck, thereby exposing to greater risk of damage, goods agreed to be carried under-deck, displace the bill of lading and make them liable for the full amount of damages sustained without

the benefit of the $500 limitation per package of the Carriage of Goods by Sea Act? [1] (33a).

2. Did the Court of Appeals err in declaring invalid, because of impossibility of performance, clause 13 of petitioners' regular form of bill of lading, incorporated by reference in their short form bill, issued to respondent *after* receipt of the goods by petitioners, which required respondent "to inform the carrier in writing *before delivery of the goods to the carrier*" that under-deck stowage was required? (14a-16a, 29a-30a, 33a).

The Decision of the Court of Appeals

In reversing and remanding, the lower court made an exhaustive review of the record, factually and legally (14a-34a), the principal conclusions being:

(1) The short form bill of lading, duly signed by petitioners' agent and delivered to respondent's agent, was "clean", importing under-deck stowage (14a-16a, 33a) (citing *St. Johns Corp.* v. *Companhia Geral,* 263 U. S. 119 [1923]).

(2) Clause 13 of the regular form bill of lading, not given to respondent, which required the latter to notify petitioners, *prior to delivery of the goods,* that it desired under-deck stowage, is invalid because of impossibility of performance (16a, 22a, 26a), which was characterized by the court as:

> "* * * a new and ingenious device which carries with it the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA" (22a).

[1] 46 U. S. C. 1304(5).

(3) "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation", having the effect of displacing the bill of lading and making petitioners "liable for the full amount of damages sustained, without the benefit of the $500 limitation per package of COGSA", measured on the fair market value at destination, less any salvage (33a; citing *Jones* v. *Flying Clipper,* 116 F. Supp. 386 [SDNY 1953]).

Of the aforementioned lower court rulings, petitioners have elected to rely upon (2), relating to the validity of clause 13 of the regular form bill of lading, and (3) the effect of the unreasonable deviation upon petitioners right to the $500 limitation per package of Section 4(5) of COGSA [46 U. S. C. §1304][5]).

ARGUMENT

POINT I

The lower court's ruling declaring Clause 13 to be invalid is correct.

(a) It was impossible for respondent to have performed the condition imposed by Clause 13 of giving notice prior to delivery of the cargo to petitioners that it desired under-deck stowage, because the bill of lading, referring to that clause, was received by respondent from petitioners after delivery of the cargo.

Clause 13 of the regular form lading required respondent to inform petitioners

> "in writing *before* the delivery of the goods to the carrier that the containers should be stowed under deck" (16a; italics in lower court opinion),

Since neither respondent, nor its shipping agent, had notice of clause 13, prior to the issuance of the short form bill, the requirement therein was impossible of performance and, therefore, not effective against respondent.[2]

On the date the bill of lading was issued, the containers were beyond recall—the ship having sailed on that date, without the knowledge of respondent, or its shipping agent, that the containers were stowed on deck (17a).

American Tobacco Co. v. *The Katingo Hadjipatera,* 81 F. Supp. 438 (SDNY 1948).

(b) Clause 13 is invalid because it is in conflict with Sections 3(2) and (8) of the Carriage of Goods by Sea Act (46 U. S. C. §§1303(2), (8) and Sections 1 and 2 of the Harter Act (46 U. S. C. §§190, 191).

It has been judicially acknowledged that on-deck carriage exposes cargo to greater risk of loss than stowage under-deck.

St. Johns Corp. v. *Companhia Geral, etc.,* 263 U. S. 119, 124 (1923);
Globe Solvents Co. v. *The California,* 167 F. (2d) 859, 863 (3 Cir. 1948).

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[2] The following excerpt is from the lower court's opinion (29a):

"Another reason why Clause 13 of the carrier's regular bill of lading cannot be invoked by Universal is because Universal is estopped from doing so. Certainly Universal, as the carrier, was chargeable with knowledge of Clause 13 in its own regular bill.

In spite of this, it received delivery of the containers from United and put them on board *before* issuing the bill of lading. At that point in time it was impossible for the shipper 'to inform the carrier in writing before delivery of the goods to the carrier' that under deck stowage was required" (italics in opinion).

Petitioners' duty to care for the containers, under a "clean" bill of lading, is specified in Sections 1 and 2 of the Harter Act (46 U. S. C., §§190-191)[3] and COGSA, Section 3(2) (46 U. S. C. §1303(2)).[4]

As petitioners, despite their statutory duty, subjected the containers to greater peril by their stowage on-deck, they failed to exercise the required due diligence under the aforementioned sections.

Clause 13 also violates Section 3(8) of COGSA (46 U. S. C. Sec. 1303[8])[5] which prohibits a carrier from "lessening" its liability as provided in the Act.

As the decisions are uniform in holding that on-deck stowage under a clean bill of lading is negligence of the grossest character, abrogating the contract of carriage, petitioners attempt to escape their insurer's liability, through the guise of clause 13, makes that clause a "covenant and agreement" under Section 3(8) "lessening" their liability for failure to perform their obligations under COGSA 3(2) to "properly and carefully * * * stow"

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[3] "It shall be unlawful for the * * * owner of any vessel * * * to insert in any bill of lading * * * any clause * * * whereby it * * * shall be relieved from liability for loss or damage arising from * * * failure in proper loading, stowage, custody, care, or proper delivery of any * * * property committed to its * * * charge" (Sec. 190); " * * * or whereby the obligations * * * to carefully handle and stow her cargo and to care for and properly deliver same shall in any wise be lessened, weakened or avoided" (sec. 191).

[4] "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." (Schroeder Bros. Inc. v. The Saturnia, 226 F. (2d) 147, 150 (2 Cir., 1955)).

[5] "Any clause, covenant, or agreement in a contract of carriage relieving the carrier * * * from liability for loss or damage to * * * goods, arising from negligence * * * in the duties * * * provided in this section, or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect."

the containers. Because clause 13 is violative of both Sections 3(2) and 3(8), the lower court correctly held it to be invalid.

(c) Clause 13 is unenforceable because petitioners, having issued a clean bill of lading, they failed to note thereon that the containers were to be carried on deck.

The court below found:

> "The bill of lading (short form and long form combined) nowhere states that the cargo *is being carried on deck.* Clause 13 says it *may* be so carried. No consignee or assignee could tell from the bill whether it was below deck or on deck cargo" (27a; italics by court).
>
> * * *
>
> "In consequence the bill of lading must be treated as a clean bill importing below deck stowage" (33a); and that
>
> "* * * the carrier has presented no evidence which even tends to show * * *"

the existence of a custom in the port of New York to stow cargo on deck for which a clean bill of lading had been issued (33a).

In so ruling the court below cited *St. Johns Corp.* v. *Companhia Geral,* 263 U. S. 119, 125 (1923) stating that this Court there held:

> "* * * that the issuance of the clean bill of lading was, in effect, an exercise of the option in favor of below deck stowage, and because the cargo was stowed on deck, there was a deviation which made the carrier liable for the lost goods" (28a).

Clause 13 is also unenforceable because the absence of an "on deck stowage" statement on the face of a negotiable bill of lading is misleading to foreign purchasers who rely upon the legal, as well as commercial, understanding that:

> "A clean bill of lading, in general, imports, unless the contrary appears on its face, that the goods are to be safely and properly secured under deck." *The Propeller Niagara* v. *Cordes*, 21 Howard, 7, 23 (1858).
>
> *The Delaware*, 14 Wall. 579, 602, 604 (1871); *The Idefjord*, 114 F. 2d 262, 266 (2 Cir. 1940); *Jones* v. *Flying Clipper* (116 F. Supp. 386, 389 (1953)); Gilmore & Black, The Law of Admiralty (p. 106).

American Mills v. *Luckenbach S.S. Co.*, 24 F. 2d 704 (5 Cir., 1928; concerning a dock fire) and *Bank of California* v. *International Mercantile M. Co.*, 64 F. 2d 97 (2 Cir. 1933; concerning a misdelivery); cited by petitioners at pages 12 and 13 in support of their contention that the lower court erred in ruling that clause 13 is invalid, are clearly distinguishable. The clauses considered in those cases were not of the unique character of clause 13 in petitioners' bill of lading, i.e., impossible of performance; nor was the issue of unreasonable deviation involved.

Davidson v. *Flood Bros.*, 30 F. 2d 279 (9 Cir. 1929), also cited by petitioners at page 13, is a pre-COGSA decision which is in conflict with the preponderating authority cited under following Point II and, particularly, is contrary to the recent *Francosteel* case, a decision by the Court of Appeals in the same State, in respect of which this Court denied certiorari.[6] Moreover, the bill of lading did not contain a clause 13, impossible of performance.

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[6] Francosteel Corp. v. N. V. Nederlandsch, 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. denied 389 U. S. 931 (1967).

POINT II

Petitioners unreasonable deviation makes unavailable to them the benefit of the Carriage of Goods by Sea Act $500 limitation.

(a) Prior to COGSA, a willfully deviating carrier could not avail itself of bill of lading exemptions from, or limitations of, liability,[7] or statutory provisions for the carrier's benefit.[8]

The basic reason therefor being that an unjustifiable deviation changes the character of the voyage so essentially as to amount to an entirely different venture from that contracted for.

(b) The decided weight of authority, after the passage of COGSA, follows the rationale of the prior cases holding that an unreasonable deviation not only deprives carriers of all exemptions and limitations in bills of lading, but also those provided by statute.

The question of whether on deck carriage of cargo, for which an under deck bill of lading was issued, deprives an ocean carrier of COGSA's $500 limitation, was answered in the affirmative by the precedent establishing decision of *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (1953 SDNY). No appeal was taken by the carrier in that

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[7] St. Johns Corp. v. Companhia Geral, etc., 263 U. S. 119, 124 (1923); The Willdomino v. Citro Chemical Co., 272 U. S. 718, 725, 727 (1927); The Malcolm Baxter Jr., 277 U. S. 323, 331 (1928); The Sarnia, 278 Fed. 459, 463 (2 Cir., 1921); cert. den. 258 U. S. 625 (1922).

[8] U. S. Shipping Board E. F. Corp. v. Rosenberg Bros. Co., 12 F. 2d 721, 723 (9 Cir. 1926); Niles-Bemont-Pond v. S.S. Balto, 282 Fed. 235, 237 (2 Cir. 1922); The Pelotas, 66 F. 2d 75, 77 (5 Cir., 1933); General Electric Co. v. Argonaut S.S. Line, 7 F. Supp. 710, 711 (EDNY 1934); The Indrapura, 171 Fed. 929, 938 (DC Ore., 1909).

case, which was represented by the law firm of which petitioners' counsel herein is a partner.

There was no further ruling upon the point until *Atlantic Mutual Insurance Co.* v. *Poseidon, etc.* (206 F. Supp. 15 [N. D. Ill., E. D., 1962]), in which it was held that while an unreasonable deviation deprived the carrier of the benefit of contractual limitations, it did not have that result in respect of statutory limitations, specifically, COGSA's time for suit limitation.[9] That judgment was affirmed on appeal (313 F. 2d 872; 7 Cir. 1963). A similar contention was rejected by the District Court in *Jones* v. *Flying Clipper, supra* (116 F. Supp. 386).

Atlantic Mutual v. *Poseidon, supra,* is the sole appellate decision that permits a carrier to limit its liability under COGSA where there has been an unreasonable deviation. It is significant that the Atlantic Mutual opinion cites no authority supporting the ruling: the authorities are to the contrary.

The *Jones* decision was cited favorably and *Atlantic Mutual* v. *Poseidon* rejected, by the Fifth Circuit in *Searoad Shipping Co.* v. *E. I. duPont De Nemours & Co.* (361 F. 2d 833 [5 Cir. 1966] cert. den. 385 U. S. 973). In the *Searoad* case, the carrier stowed a trailer-van on deck, for which a clean bill of lading had been issued. The Court said (pp. 835-836):

> "* * * we have no doubt that the insurer liability continues after COGSA to flow from on deck deviation where the damage is causally related."

The existence of a causal relation in the present case is shown by the District Court's finding that respondent's cargo was damaged by sea water during the voyage (17a).

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[9] 46 U. S. C. §1303(6).

A further appellate decision applying the rule in *Jones* v. *Flying Clipper,* is *Francosteel Corp.* v. *N. V. Nederlandsch* (249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. den. 389 U. S. 931 [1967]). In that case, the appeal was from a judgment dismissing the complaint on the ground that the action was barred by COGSA's one-year time for suit provision. Plaintiff urged that defendant's on-deck carriage, under a clean bill of lading, constituted an unjustifiable deviation which nullified that statutory defense.

The appellate court sustained the carrier's time for suit defense stating:

> "There is nothing inherent in the violation of deck stowage which prevents the shipper from discovering his loss and pursuing his claim for damages" (p. 2462).

But ruled further:

> "* * * that insofar as a deviation, or breach of the contract which would at common law render the contractual provisions void, contributes to or causes a loss, the carrier cannot rely on provisions which permit it to escape liability for the damages resulting therefrom" (pp. 2461-62).

In making the latter ruling, the court rejected that part of the decision in *Atlantic Mutual* v. *Poseidon,* that held COGSA's $500 limitation applicable notwithstanding the on-deck stowage under a clean bill of lading, in the following language (p. 2460):

> "From the foregoing cases it appears that defendant's reliance on Poseidon resembles a sand castle in danger of engulfment from a rising tide of contrary opinion. (See Criticism of the District Court decision [N. D. Ill., 1962], 206 F. Supp. 15, which

was affirmed in Poseidon; Note, 36 Temple L. Q. 222 (1963) and Note on Flying Clipper, 102 U. of Pa. L. Rev. 797 [1954]).''

POINT III

COGSA made no change in the law of Ocean Carriage as to the effect of an unreasonable deviation upon a carrier's liability.

COGSA's only reference to deviation is in Section 1304(4)[10]. That section declares merely that certain types of deviation to be justifiable, while other acts shall be considered, *prima facie,* unreasonable deviations.

If it had been the intention of Congress to effect a change in the common law rule by abolishing the existing penalty, there was no necessity for including Section 4 in the Act. The language of Section 4 shows that the intent of Congress was to liberalize the law of deviation by limiting the penalty existing prior to COGSA only for an unreasonable deviation.

That there was no intent to repudiate the pre-COGSA penalty finds support in the following authorities:

Jones v. *Flying Clipper, supra* (116 F. Supp. at pp. 389, 390).[11]

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[10] "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

[11] "There is nothing in the history of the Act to indicate that Congress by fixing the limitation at $500 intended to displace the

(footnote continued on next page)

Knauth, Ocean Bills of Lading (4th Ed. 1953) (p. 241).[12]

The post-COGSA decisions support the views expressed above as to the effect of an unreasonable deviation.[13]

(footnote continued from previous page)

doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. Such a drastic change in the existing law, with its far-reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms."

"To uphold the carrier's contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing that it cannot be called upon to pay more than $500 per package."

"Such a policy, if upheld, would immunize the carrier against the consequences of its own willful actions at the expense of an innocent party. In effect, it would result in granting to the carrier exoneration for all damages in excess of $500, even in instances where its conduct in changing the essential nature of the contract caused the damages."

[12] "Neither the Convention nor any Act passed under the Convention contains any provision concerning the legal result of a deviation. Nor is there any other statute on the subject. Consequently the general case law continues to furnish the rule."

[13] Haroco Co. Inc. v. The Tai Shan, 111 F. Supp. 638, 645-646 (SDNY), aff'd 218 F. 2d 822 (2 Cir. 1955), and Hoskyn & Co., Inc. v. Silver Line, Ltd., 63 F. Supp. 452, 468 (SDNY, 1943), aff'd 143 F. 2d 462 (2 Cir. 1944), in which the courts considered fire losses arising subsequent to COGSA and held that unreasonable deviation can deprive carriers of statutory liability exemption under the Fire Statute and similar fire exception of COGSA.

Switzerland General Insurance Co. v. Navigazione Libera Triestina S.A., 91 F. 2d 960, 963 (Cir. 2, 1937), which concerned the British Carriage of Goods by Sea Act. It was held that cargo had failed to establish an unreasonable deviation and, therefore, was denied a recovery because of non-compliance with the one-year time for suit provision.

(footnote continued on next page)

Also the following cases relating to statutory limitations which are considered at pages 9-10, *supra*.

Searoad Shipping Co. v. *E. I. duPont de Nemours Co., supra,* (361 F. 2d 833, 835-836 [5 Cir., 1966], cert. denied 385 U. S. 973);

Francosteel Corp. v. *N. V. Nederlandsch, supra,* (249 Cal. App. 2d 880; 57 Cal. Reptr. 867 [9 Cir., 1967], cert. den. 389 U. S. 931 (1967)).

(footnote continued from previous page)

American Cyanamid Co. v. Booth S.S. Co., 99 F. Supp. 232, 236 (SDNY, 1951), aff'd 195 F. 2d 529 (2 Cir., 1952), a stranding case: It was there held that cargo, having failed to establish an unreasonable deviation, the carrier was not denied the benefit of COGSA's exemption from liability for errors in navigation of the vessel.

Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd., [House of Lords, 1932] A. C. 328, 340, 41 Ll. L. Rep. 165, a case under the British Carriage of Goods by Sea Act where the carrier claimed the benefit of the exemption from liability for errors in navigation of the vessel.[14]

[14] Lord Atkins said:

> "I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of the contract of carriage of goods by sea to which the Act applies."

Lord Russell of Killowen at page 347.

> "It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only apply to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms."

U. S. v. *Atlantic Mutual Ins. Co.*, 343 U. S. 326 (1952), held that the public policy permitting an innocent party to collect in full from either of two joint tort feasors overrode the COGSA exemption from liability for errors in navigation and that the clause was void. Gilmore & Black, The Law of Admiralty, (1957) comment upon this Court's refusal in *U. S.* v. *Atlantic Mutual, supra,* to extend the carrier's rights under the Harter Act and COGSA by "analogy, inference, or appeals to symmetry and 'reasonableness'." [15]

Virtually all of the well known authors of texts on admiralty law have expressed similar views.[16]

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[15] "The Supreme Court declared the clause invalid in an opinion which shows how much vitality is left in the traditional American notions on 'negligence' clauses of all sorts in contracts of carriage. Pointing out that the public policy of this country had, prior to the Harter Act, been resolute in denying carriers the right to escape by 'contract' the consequences of their negligence, the Court further noted that the Harter Act and COGSA, being compromises, carved out definite exceptions to this principle. But it declined to extend these exceptions by inference to include a matter not expressly covered" (page 154).

* * *

"It shows the Supreme Court firmly opposed to the view that the carrier's rights under Harter and COGSA are to be extended by analogy, inference or appeals to symmetry and 'reasonableness.' The exculpatory sections of these acts, it may now be said on authority, represented limited concessions to the carrier interests. Over vigorous dissent on this very point, by Mr. Justice Frankfurter, *the Court refused to see in these enactments any general repudiation of antecedent policy long hardened into rules of law"* (italics supplied) (page 155).

[16] Williston on Contracts, Vol. IV, pp. 3080-3082; Carver, Carriage of Goods by Sea, Vol. 1, Sec. 299, p. 300 (11th Ed.); Longley, Common Carriage of Cargo (1967) (pp. 129-131; Robinson on Admiralty, p. 533 (1939 Ed.); Tetley, Marine Cargo Claims (1965) p. 19.

POINT IV

The legislative history, as well as the text of COGSA, establish that the intention of the legislators was to increase the carrier's liability and particularly that they intended that the $500 limitation did not apply in a case of deviation not excusable under COGSA, §4(4).

The court in *Atlantic Mutual* v. *Poseidon, supra,* stated its accord with the District Court's ruling in *Jones* v. *Flying Clipper, supra,* that the deviation principle is "firmly entrenched in Admiralty Law"; yet it rejected that principle without specific authorization in the statute. The court reached that result despite the clear intent of the language of the Act to preserve the consequences of deviation. Moroever, testimony given during the Congressional hearings on the proposed legislation was to the effect that the purpose of the limitation provision was to *increase,* and not decrease carrier's liability.

Committee reports and statements of the sponsors of legislation are significant expressions of legislative intention. *Wright* v. *Vinton Branch,* 300 U. S. 440, 463-464 (1937); *Duplex Co.* v. *Deering,* 254 U. S. 443, 474-475 (1921).

Numerous hearings were held at Washington upon COGSA from 1921 until 1936, during the course of which representatives of cargo and hull interests were asked by various Congressional Committees to express their views. Statements by Senator White, who introduced the bill, which initially bore his name, gave clear indication that the proposed legislation was for the interest of the shippers rather than the carriers, and that the common law rule of

liability in respect of damage occurring during an unreasonable deviation was to be unchanged.[17]

Additional legislative support for Senator White's statement that "our law remains * * * unaffected and unimpaired" by COGSA, appears in House Report 2218, 74th Cong. 2nd Session:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce. *It fixes an irreducible minimum of immunity of the carrier from liability*" (p. 1) (Italics supplied).

That the language of Section 4(4) of COGSA, and the Congressional hearings leading up to its enactment, forbid carriers to alter their common law liability for losses causally relating to unreasonable deviations, is shown by the views expressed by the representatives of hull interests who testified at those hearings, particularly the state-

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[17] "I may say that one of the outstanding purposes of the proposed legislation is to increase the character and degree of responsibility of the carriers; and the bill was designed in large measure in the interest of the *shippers rather than of the carriers.* * * *

* * * The legislation supersedes the so-called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. Otherwise, *our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.*" S. 1152, 74th Cong. 1st Session, 79th Cong. Rec. p. 13341 (part 12) (1935) (Italics supplied).

* * *

"Four principal changes in the law will be worked by the legislation:

The first one has reference to the limit of liability. Under this provision I should say generally that the limit of liability of the carrier is substantially *increased.*" (79th Cong. Rec. pt. 12, 74th Cong. 1st Sess. p. 13341) (Italics supplied).

ments of Mr. Charles S. Haight [18] of Haight, Gardner, Poor & Havens and Mr. Ira Campbell [19] of Kirlin, Campbell & Keating, senior partners of their respective New York law firms, who appeared as counsel for hull interests.

POINT V

The phrase in Section 4(5) of COGSA, "in any event", does not provide protection for the petitioners herein.

In reaching the conclusion that the carrier's deviation did not deprive it of the benefit of COGSA's Section 4(5), the court in *Atlantic Mutual* v. *Poseidon, supra,*—upon which petitioners base their principal reliance—adopted the single ground on which the District Court predicated its conclusion and, indeed, quoted at length from the opinion of that court. There is no suggestion in the appellate court's opinion of independent legal research of the issue of law presented. The basis of the District Court's ruling, thus accepted by the appellate court, is that Congress in employing the words "in any event", intended to give an

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[18] "Q. Referring to Mr. Herrick's famous case, do you think any court would hold the deviation of which he complains would be a reasonable deviation?" Mr. Haight replied: "It is unthinkable * * *. Q. In other words, if Mr. Herrick had had the benefit of these rules at that time, he would have had full recovery and would never have that case to complain of?" Mr. Haight: "If he had these rules in that case probably full recovery would have been awarded." (House Committee, Merchant Marine and Fisheries, 67th Cong. 4th Sess.) (p. 103).

[19] "Deviation is an exceedingly vital subject to the shipowners, because it not only renders the shipowners liable for losses that may result from the deviation itself but liable for any other loss that happens on the voyage, whether connected with the deviation or not; it makes him absolutely an insurer." (House Committee, Merchant Marine and Fisheries, 68th Cong. 2nd Sess. p. 139.)

absolute right which could not be denied carriers, regardless of the character of the act which caused the loss or damage to the cargo owner's property. The District Court also concluded that the phrases "in any event" and "any loss or damage" in section 4(5) of COGSA (46 U. S. Code, Sec. 1304(5), indicated an intention on the part of Congress to effect a change in the existing law that an unjustifiable deviation is such a fundamental breach of the contract of carriage as to deprive it of the benefit of all contractual and statutory limitations of liability (313 F. 2d at p. 875).

The same contention was advanced by the law firm of which counsel in the present case is a partner, in their representation of the vessel owner in *Jones* v. *The Flying Clipper, supra* (116 F. Supp. 386) and was rejected by the District Court because the unreasonable deviation had abrogated the contract of carriage.[20]

The Dissenting Opinion in the Court Below

The dissenting Judge's view that petitioners are entitled to the benefit of COGSA's $500 limitation, despite

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[20] "Much of the carrier's argument for preserving 'in any event' the limitation of liability rests upon a basic misconception of the nature of its breach in stowing the cargo on deck. It attempts to equate unjustifiable deviation with ordinary breaches of obligation under the Act, such as lack of due diligence to make the vessel seaworthy, or properly and carefully to handle, stow, care for, or deliver her cargo and the like. But mere negligence with regard to stowage or handling of the cargo has never constituted deviation. Deck stowage where underdeck stowage is required is more than negligence—it is a deviation with resulting abrogation of the contract. And in my view it is unnecessary to base the voiding of the contract on the ground that it was the result of the carrier's 'gross' violation of its terms; or his 'misconduct'; or that on deck stowage under a clean bill of lading 'would work a fraud'; or that the carrier 'converted' the cargo. It is sufficient that the carrier's voluntary action in unjustifiably deviating so changed the essence of the agreement as to effect its abrogation". (opinion, pp. 389-390).

their willful deviation, is predicated upon the sole appellate authority of *Atlantic Mutual* v. *Poseidon, supra* (313 F. 2d 872; 7 Cir., 1963) (36a).

The inconsistencies of the Poseidon opinion, its conflict with the language and spirit of COGSA and the opinions of the various Federal trial and appellate court decisions, suggests that the dissenting Judge's reliance upon *Atlantic Mutual* v. *Poseidon* is misplaced.

The dearth of authority and absence of analysis in the dissenting opinion also suggests an *en passant* consideration of the issues which, we submit, is in significant contrast to the exhaustive and scholarly opinion of the majority Judges.

Specific errors of the dissenting Judge are readily apparent:

(a) The excerpt quoted from the opinion in Searoad Shipping Co. v. E. I. duPont etc. (361 F. 2d 833 [5 Cir.], cert. den. 385 U. S. 973 [1966] that "the doctrine of deviation in maritime law at least to the extent that insurer's liability attaches only when the damage is causally related to the unreasonable deviation" (37a), is not pertinent to the present case because a causal relation was established, i.e., counsel stipulated, and both the trial and appellate courts found, that respondent's goods were damaged by sea water while being carried on deck (17a).

(b) The dissenting opinion announces the novel proposition that "each container as a unit is the package to which the $500 limitation should be applied" (37a), citing as authority, Standard Electrica, S.A. v. Hamburg etc., 375 F. 2d 943 (2 Cir.),

cert. den. 389 U. S. 831 (1967). That case involved neither a container nor the issue of deviation.[21]

(c) The dissenting judge concluded that the parties intended each container to be a "package" because the shipments were described in the bill of lading as, e.g.: "(1) One metal container No. UCC—5530 said to contain: 536 ctns. bound books", citing as sole authority, Standard Electrica S.A. v. Hamburg, etc., supra (375 F. 2d 943) (2 Cir. 1967) (37a-38a).

Strangely, the foregoing view is in conflict with that expressed by the dissenting judge as a majority judge in the *Standard Electrica* case, *supra*.

The majority opinion in the *Standard Electrica* case states that where a shipper describes his goods as did the respondent herein:

> "we think such characterizations are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a 'package' and those characterizations further reflect the meaning given that term by the custom and usage of the trade." (375 F. 2d at p. 946.)

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[21] No American court has yet decided the question of whether a container and its cargo is a "package" under COGSA's §4(5). The French Court of Cassation has ruled that a container is not a "package" (Societe Navale Caennaise v. Gastin (Droit Maritime Francais, 1965: 18) (cf. Perregaux v. Lignes Franco-Marocaines Veerhaven (Droit Maritime Francais, 1958: 52); Cunard Steamship Co. Ltd. v. Department of Customs (Droit Maritime Francais, 1960: 46).

POINT VI

Sound public policy would seem to require that liability for the hazards of on deck stowage continue to be imposed on willfully deviating shipowners, rather than on innocent cargo owners. Certainly, the opposite result should not be reached without a clear and compelling indication that such was the intent of Congress.

Petitioners urge that COGSA has disregarded the historical background and above internationally recognized rule of maritime law by abolishing the carrier's status of an insurer and substituting in lieu thereof the same limited liability under Section 4(5) of the Act as governs the liability of a non-deviating carrier.

In *Atlantic Mutual* v. *Poseidon, supra,* the appellate court adopted the statement of the District Court that it "is sufficiently clear and unmistakable" that the language of COGSA "constitutes a change of existing law" as to a carrier's liability in the event of a deviation (313 F. 2d at p. 875). It is submitted that that conclusion is manifestly incorrect.

As appears in COGSA's Section 4(4),[22] there is no indication of an intention to change the established common law rule as to the consequence of a deviation on a carrier's liability. That section merely declares certain types of deviation to be justifiable and, at the same time, declaring certain acts to be *prima facie* unreasonable deviations.

The significant weakness of the Atlantic Mutual decision is the inequitable result reached by enforcing the Act where there has been an unreasonable deviation.

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[22] 46 U. S. C. Sec. 1304(4). See text of Section 4(4) at page 12 supra.

Should this be the ultimate judicial determination, the courts will be in the position of coming to the aid of a wrongdoer at the expense of an innocent party.

It is, we submit, clear that Congress intended to preserve the concept of deviation in specifying the minimum standards of the carrier's liabilities. It is also clear that Congress would not have expressly preserved the legal concept of deviation and, in the following section of COGSA, abolish the principal characteristic of deviation, i.e., unlimited liability. Since Section 4(4) provides that a reasonable deviation is not to be construed as a breach of the Act, it is logical to infer that an unreasonable deviation does breach the statute and render the $500 limitation clause inoperative.

The Court in *Atlantic Mutual* v. *Poseidon, supra,* in ruling that COGSA has changed the long established rule as to the effect of an unreasonable deviation, overlooked this inconsistency in its interpretation of the Act; it also reached that conclusion in disregard of a further cardinal canon of statutory interpretation, i.e., that statutes in derogation of common law are to be strictly construed (82 C. J. S. Sec. 393), particularly contracts exempting carriers from liability for negligence (*Caterpillar Overseas S.A.* v. *S.S. Expeditor,* 318 F. 2d 720, 722 (2 Cir. 1963) cert. denied, 375 U. S. 942 (1963); *Boston Metals Co.* v. *Winding Gulf,* 349 U. S. 122, 123 (1955); *Bisso* v. *Inland Waterways Corp.,* 349 U. S. 85, 90 (1955)).

In *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952), this Court said:

> "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

That principle was applied to COGSA in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 304-305 (1959).

The questions presented by the petition are essentially narrow and not of substantial public interest of such complexity or importance that the aid of this Court is properly invoked. All that is involved is the validity of an unusual bill of lading clause, and the effect of a willful deviation upon an ocean carrier's claim to the benefit of COGSA's $500 limitation—a statutory provision in derogation of petitioners common law liability for respondent's loss of $172,200.

Conclusion

The questions presented were correctly decided by the court below. Moreover, as is indicated by this Court's denial of petitions for writs of certiorari in three recent cases,[23] concerning on-deck stowage and its effect upon willfully deviating shipowners, the instant questions are not of sufficient importance to merit this Court's attention.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

F. Herbert Prem,
Counsel for Respondent,
Encyclopaedia Britannica, Inc.

Dated: February 16, 1970

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[23] Francosteel Corp. v. N. V. Nederlandsch, etc., 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. denied, 389 U. S. 931 (1967);

Searoad Shipping Co. et al. v. E. I. duPont de Nemours & Co., Inc., 361 F. 2d 833 (5th Cir.); cert. denied, 385 U. S. 973 (1966);

Atlantic Mutual Ins. Co. v. Poseidon, etc., 313 F. 2d 872 (7th Cir.); cert. denied, 375 U. S. 819 (1963).

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1126

UNIVERSAL MARINE CORPORATION, and S.S. "HONG KONG PRODUCER", her engines, etc.,

Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The arguments set forth in Respondent's Brief in Opposition are unrelated to the controlling factors determinative of whether a writ of certiorari is warranted in the present matter.

Petitioners' First Reason for Granting the Writ

The "first reason" proposed by Petitioners for granting the Writ is that the decision of the Court of Appeals for the Second Circuit below conflicts with the decision of the Court of Appeals for the Seventh Circuit as to the interpretation of 46 USC § 1304(5) (Petition, p. 7). Respondent's objections thereto are set forth in Points II, III, IV, V and VI of its brief. The "Points" in question are nothing more than a marshalling of Respondent's arguments in